PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–736 OF 1998
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
7 JUNE 1999

Land Law *— Sale of land — No issue document of title or registered charge — Land assigned to lender as security for loan — Whether lender may, without obtaining an order of sale, realize his security — Whether assignee must obtain order for sale to recover monies due — Whether assignee an equitable chargee only if assignment was not absolute — Whether transaction amount to an equitable charge or mortgage — Whether assignee may contract out of O 83 of the Rules of the High Court 1980 and be allowed to exercise its contractual power of sale — Rules of the High Court 1980 O 31 r 1(1) & O 83*

Land Law *— Charge — Equitable charge — No issue document of title or registered charge — Absolute assignment by borrower of rights over immovable property — No deposit of title deed given as security for loan —Whether amount to mortgage at common law*

The respondents entered into a sale and purchase agreement with the developer to purchase a shop lot in soon to be errected multi-storeyed building ('the subject property'). The subject property however was without a separate strata title. The respondents' purchase was funded by a loan from the appellant bank. A loan agreement cum assignment ('the assignment') was executed by the parties. Subsequently, the respondents defaulted in making repayment of the loan as provided under the assignment. The appellant took steps to sell the subject property by public auction, but without having first obtained an order of court in that behalf. In resorting to the remedy of self-help, the appellant relied on the powers of attorney (entered into earlier by the parties) and the assignment. The respondents, dissatisfied, took out an originating summons seeking, inter alia, a declaration that the exercise by the appellant of its right to sell the subject property by public auction is invalid and/or unlawful. At the High Court, the learned judge granted the declaration (see [1999] 1 MLJ 89). Having held the assignment to be absolute, the learned judge went on to hold that it was therefore incumbent for the appellant to apply for and obtain an order for sale pursuant to O 31 r 1(1) of the Rules of the High Court 1980 ('the RHC'). He further held that even if he were to hold the assignment not to be absolute, it created an equitable charge which was only enforceable by resort to the procedure laid down in O 83 of the RHC. The appellant appealed.

The main issue was whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge. It was argued that the learned judge erred in concluding that: (1) an assignee who is similarly circumstanced as the appellant *must* obtain an order for sale from the court for the purpose of recovering monies due to it from a borrower;

and (ii) the appellant was a equitable chargee only in the event that the assignment was not absolute. It was also submitted that a transaction such as this does not amount to an equitable charge or mortgage as there was no deposit of title deed given as security for the loan. Another issue was whether the fact that the assignment is an equitable mortgage precludes the appellant from exercising its contractual power of sale.

Held, dismissing the appeal:

(1) It is not mandatory for a lender who secures a loan by means of a deed of assignment over immovable property — that is without an issue document of title — to move the court under O 31 r 1(1) of the RHC and obtain an order for sale for the purpose of enforcing his security (see p 170F–G).

(2) The court disagrees with counsel's submission that the appellant is in a like position to a mortgagee at common law. In a common law mortgage, the *legal title* to immovable property is transferred absolutely by the mortgagor to the mortgagee, the former having an equity to redeem the title upon making payment of the loan. In the present instance, there was merely an absolute assignment of all benefits which the respondents had under the agreement they had with the developer. It was in reality an assignment of a chose in action. What the respondents had was a right in contract to have a re-assignment of the chose unto themselves when they had paid off the loan. This is far from saying that they had an equity of redemption (see p 171A–C).

(3) An absolute assignment by a borrower of all his rights over immovable property that has no issue document of title to a lender as security for a loan is an equitable mortgage (see p 182B–C); *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97 and *Malayan Banking v Zahari bin Ahmad* [1988] 2 MLJ 135 followed. Accordingly, the assignment, being an absolute assignment of the respondents' rights over the subject property to the appellant, is an equitable mortgage (also known as an equitable charge in the context of our jurisprudence). The court therefore must reject the appellant's contention that the assignment does not amount to an equitable charge (see p 182D–E).

(4) There is no impediment to give effect to an agreement to create a legal mortgage as creating a present mortgage in equity, provided those other features that equity looks for, such as acts of part performance, are present. Clause 26 of the assignment — which contains a covenant by the respondents to execute and deliver to the the appellant a charge under the National Land Code 1965 once a strata title in respect of the subject property has been issued — is a promise de futuro by the respondents to create a legal charge in the appellant's favour over the subject property. The making of the loan by the appellant, thus, amounted to part

performance of its reciprocal promise. Therefore, the court may treat the covenant in cl 26 of the assignment as an equitable charge, which in this case, is synonymous with an equitable mortgage (see pp 183G–H, 184C–D).

(5) Once it is held that the assignment is an equitable charge, the appellant must have resort to O 83 of the RHC because: (a) an equitable chargor cannot contract out of the provisions of O 83, as it would be contrary to public policy to permit the respondents as members of the class for whose benefit exists from either waiving or contracting out of its provisions; and (b) cl 23.4 which reserves a power in the appellant to effect a sale by public auction without reference to the court amounts to a contracting out and is therefore null and void and of no effect (see pp 186D–E, 187B).

[Bahasa Malaysia summary

Responden-responden memasuki suatu perjanjian jual beli dengan pemaju untuk membeli sebuah lot kedai dalam bangunan bertingkat-tingkat yang akan dibina tidak lama lagi ('harta subjek tersebut'). Harta subjek tersebut walau bagaimanapun adalah tanpa hakmilik strata berasingan. Pembelian responden adalah dibiayai oleh suatu pinjaman daripada bank perayu. Suatu perjanjian pinjaman dan juga penyerahhakan ('penyerahhakan tersebut') telah disempurnakan oleh pihak-pihak tersebut. Kemudiannya, responden-responden ingkar dalam membuat pembayaran balik pinjaman tersebut seperti yang diperuntukkan di bawah penyerahhakan tersebut. Perayu telah mengambil langkah-langkah untuk menjual harta subjek tersebut melalui lelong awam, tetapi tanpa terlebih dahulu memperolehi suatu perintah mahkamah untuk tujuan tersebut. Dalam mengambil jalan keluar kepada remedi usaha sendiri, perayu bergantung kepada surat kuasa-surat kuasa wakil (yang dimasuki lebih awal oleh pihak-pihak tersebut) dan penyerahan hak tersebut. Responden-responden, yang tidak berpuas hati, mengambil saman pemula memohon, antara lain, suatu deklarasi bahawa bahawa pelaksanaan oleh perayu akan hak-haknya untuk menjual harta subjek tersebut melalui lelong awam adalah tidak sah dan /atau menyalahi undang-undang. Di Mahkamah Tinggi, hakim yang bijaksana membenarkan deklarasi tersebut (lihat [1999] 1 MLJ 89). Setelah memutuskan bahawa penyerahhakan tersebut adalah mutlak, hakim yang bijaksana terus memutuskan bahawa adalah wajib bagi perayu untuk memohon dan memperolehi suatu perintah jualan berikutan dengan A 31 k 1(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Beliau selanjutnya memutuskan bahawa jikalau pun beliau memutuskan penyerahhakan tersebut adalah tidak mutlak, ia mewujudkan suatu gadaian ekuiti yang mana hanya boleh dikuatkuasakan dengan mengambil jalan keluar kepada prosedur yang diperuntukkan dalam A 83 KMT. Perayu merayu.

Isu utama adalah sama ada seorang pemberi pinjaman boleh, tanpa memperolehi suatu perintah jualan daripada mahkamah, merealisasikan cagaran yang terdiri daripada harta tak alih di mana

tidak terdapatnya pengeluaran dokumen hakmilik dan tiada gadaian berdaftar. Adalah dihujahkan bahawa hakim yang bijaksana telah silap dalam membuat kesimpulan bahawa: (i) seorang pemegang serahhak yang dalam keadaan serupa seperti perayu mestilah memperolehi perintah jualan daripada mahkamah untuk tujuan mendapat kembali wang yang harus dibayar kepadanya daripada seorang peminjam; dan (ii) perayu adalah pemegang gadaian ekuiti hanya di dalam keadaan penyerahhakan tersebut adalah tidak mutlak. Adalah juga dihujahkan bahawa suatu urus niaga seperti ini tidak sama seperti gadaian atau gadai-janji ekuiti memandangkan tiada terdapatnya deposit suratikatan hakmilik yang diberikan sebagai cagaran untuk pinjaman tersebut. Suatu isu lagi adalah sama ada fakta bahawa penyerahhakan tersebut adalah gadai-janji ekuiti menghalang perayu daripada melaksanakan kuasa jualan kontrak.

Diputuskan, menolak rayuan:

(1) Adalah bukan mandatori untuk seorang pemberi pinjaman yang memperolehi cagaran suatu pinjaman melalui cara-cara suratikatan penyerahhakan ke atas harta tak alih — iaitu tanpa pengeluaran dokumen hakmilik — untuk mendorong mahkamah di bawah A 31 k 1(1) KMT dan memperolehi suatu perintah jualan untuk tujuan menguatkuasakan cagaran beliau (lihat ms 170F–G).

(2) Mahkamah tidak bersetuju dengan hujahan peguamcara bahawa perayu adalah dalam keadaaan seperti dengan pemegang gadai-janji di bawah common law. Dalam gadai-janji common law, hakmilik undang-undang kepada harta tak alih adalah dipindahmilik secara mutlak oleh penggadai-janji kepada pemegang gadai-janji, penggadai-janji mempunyai suatu ekuiti untuk menebus hakmilik setelah membuat pembayaran pinjaman tersebut. Di dalam keadaan kini, cuma terdapatnya penyerahhakan muktamad kesemua manfaat-manfaat yang mana responden-responden telah di bawah perjanjian dengan pemaju. Apa yang dimiliki oleh responden-responden adalah hak di bawah kontrak untuk mendapat suatu penyerahhakan semula hak kepada mereka sendiri apabila mereka telah melangsaikan pinjaman tersebut. Ini adalah jauh berbeza daripada mengatakan bahawa mereka mempunyai penebusan ekuiti (lihat ms 171A–C).

(3) Suatu penyerahhakan muktamad oleh peminjam akan kesemua hak-haknya ke atas harta tak alih yang tidak mempunyai pengeluaran dokumen hakmilik kepada pemberi pinjaman sebagai cagaran untuk suatu pinjaman adalah suatu gadai-janji ekuiti (lihat ms 182B–C); *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97 dan *Malayan Banking v Zahari bin Ahmad* [1988] 2 MLJ 135 diikut. Dengan demikian, penyerahhakan tersebut, yang merupakan suatu penyerahhakan muktamad akan hak-hak responden-responden ke atas harta subjek tersebut kepada perayu, adalah suatu gadai-janji ekuiti (juga dikenali

sebagai gadaian ekuiti di dalam konteks jurisprudens kita). Maka mahkamah mesti menolak penegasan perayu bahawa penyerahhakan tersebut tidak terjumlah kepada suatu gadaian ekuiti (lihat ms 182D–E).

(4) Tidak terdapatnya halangan untuk memberi kesan kepada suatu perjanjian untuk mewujudkan suatu gadai-janji di sisi undang-undang sebagai mewujudkan suatu gadai-janji ekuiti pada masa kini, jika ciri-ciri lain tersebut yang dicari oleh ekuiti, seperti tindakan-tindakan pelaksanaan sebahagian, wujud. Fasal 26 penyerahhakan tersebut — yang mengandungi suatu perjanjian oleh responden-responden untuk menyempurnakan dan menghantarserah kepada perayu suatu gadaian di bawah Kanun Tanah Negara 1965 sebaik sahaja hakmilik strata berkenaan dengan harta subjek tersebut telah dikeluarkan — adalah suatu janji de futuro oleh responden-responden untuk mewujudkan suatu gadaian di sisi undang-undang yang memihak kepada perayu ke atas harta subjek tersebut. Pinjaman tersebut yang dibuat oleh perayu, maka, sama seperti pelaksanaan sebahagian janji salingannya. Maka demikian, mahkamah boleh menganggap perjanjian tersebut di dalam fasal 26 penyerahhakan tersebut sebagai gadaian ekuiti, yang mana di dalam kes ini, adalah sinonim dengan gadai-janji ekuiti (lihat ms 183G–H, 184C–D).

(5) Sebaik sahaja diputuskan bahawa penyerahhakan tersebut merupakan suatu gadaian ekuiti, perayu mesti mengambil jalan keluar dengan merujuk kepada A 83 KMT kerana: (a) seorang penggadai ekuiti tidak boleh berkontrak di luar peruntukan-peruntukan A 83, kerana ini akan bertentangan dengan polisi awam untuk membenarkan responden-responden sebagai ahli-ahli kelas yang mana manfaat wujud daripada sama ada mengenepikan atau berkontrak di luar peruntukan-peruntukannya; dan (b) fasal 23.4 yang menguntukkan kuasa di perayu untuk melaksanakan suatu jualan melalui lelong awam tanpa rujukan kepada mahkamah sama seperti berkontrak di luar dan maka demikian adalah batal dan tidak sah dan tidak mempunyai kesan (lihat ms 186D–E, 187B).]

Notes

For cases on equitable charge, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1426–1428.

For cases on sale of land generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2435–2819.

Cases referred to

Arab-Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525 (refd)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97 (folld)
Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd [1988] 2 MLJ 62 (refd)
Haji Abdul Rahman v Mahomed Hassan [1917] AC 209 (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)
Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)
Lee Lee Cheng v Seow Peng Kwang [1960] MLJ 1 (refd)
Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)
Malayan Banking Bhd v Zahari bin Ahmad [1988] 2 MLJ 135 (folld)
Malayan United Finance Bhd v Tan Lay Soon [1991] 1 MLJ 504 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)
Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 14 (refd)
Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd [1997] 2 MLJ 590 (refd)
Tennant v Trenchard (1869) 4 Ch App 537 (refd)
Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener) [1998] 5 MLJ 162 (refd)
Wicks v Wicks [1998] 1 All ER 977 (refd)

Legislation referred to

Civil Law Act 1956 ss 3(1), 4(3)
Indian Civil Procedure Code s 151
National Land Code 1965 s 257
Rules of the High Court 1980 O 31 r 1(1), O 83 rr 1(1), (2), 3 (1), (2), (3), O 92 r 4
Rules of the Supreme Court 1957
Specific Relief Act 1950 s 41

Porres Royan (*Yoong Sin Min* with him) (*Shook Lin & Bok*) for the appelant.
Alex de Silva (*V Pury & Bala*) for the respondent.

Gopal Sri Ram JCA:

Preliminary

This appeal was heard and dismissed on 7 April 1999. My reasons for the decision now follow.

A short but important point of law has been raised in this appeal. At issue is the broad question whether a lender may, without obtaining an

order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.

There are many instances in this country where banks and other financial institutions finance the purchase of delineated parcels without strata titles in multi-storeyed buildings. In the usual case, the lender takes an assignment of the parcel in question together with a charge in escrow as security for the loan. Difficulties arise when the borrower defaults and the lender is desirous of realizing his security. The present appeal is one such case. Its factual matrix is as follows.

The facts

Phileo Promenade Sdn Bhd ('the vendor') is a property development company. It owns a piece of land on which it has erected a multi-storeyed building. It is known as 'Phileo Promenade'. It is situated at a prestigious location in the City of Kuala Lumpur. The building is made up of shop lots and office space. Well before its completion, the developer offered units within the building for sale to the public.

The respondents wanted to purchase one unit of a shop lot in the building. On 12 November 1994, they entered into a sale and purchase agreement with the developer to purchase a shop lot measuring 1,497 square feet on the eighth floor of the building in question. It was called 'Unit D7-08'. I will refer to it as 'the subject property'. A floor plan in which the subject property was delineated and identified with sufficient precision was annexed as a schedule to the agreement. However, the subject property was without a separate strata title.

The purchase price for the subject property was RM449,100. It was to be paid in instalments according to the progress in the construction of the building. The respondents' purchase of the subject property was funded in the main by a loan from the appellant bank. The amount of the loan was RM359,000. The loan was secured by means of three documents. The first of these was a loan agreement cum assignment ('the assignment') executed by both respondents. The second and third were two powers of attorney, one from each of the respondents. Both were dated 3 January 1996. The latter were registered with the High Court on 15 January 1979. For reasons that will become apparent, the powers of attorney assume no significance in the present appeal.

But the assignment is an important document. It contains a number covenants. Of these, three are critical to the present appeal. They are cll 8, 23.4 and 26. This is what they say:

> 8 For the consideration aforesaid the borrower hereby absolutely assigns to the bank the full and entire of the borrower's benefits rights title and interest in and to and under the sale agreement and in the said property together with the borrower's right of enforcement thereof or thereunder PROVIDED ALWAYS that notwithstanding the assignment herein-before contained or any other provision of this assignment the borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement.

23 The bank may at any time after an event of default or in making demand be entitled to exercise all or any of the rights and powers following: A

23.4 the right and power to sell and assign the said property as the absolute unencumbered owner thereof at such price or prices and in such manner as the bank shall in its absolute discretion think fit free from any interest of the borrower hereunder or otherwise and to apply the proceeds of sale in or towards the satisfaction of the B amount hereby secured and all the principal and interest and other monies due to the bank hereunder, the payment to the relevant authorities of all quit rent, assessment, drainage, rates and other outgoings payable in respect of the said property, the payment to the developer or the management corporation constituted under the Strata Titles Act 1985/the Land Ordinance (Sabah Cap 68) C and the Land (Subsidiary Title) Enactment 1972 (Sabah)/the Land Code of Sarawak and the Strata Titles Ordinance 1972 (Sarawak), as the case may be, of all service charges and maintenance fees payable in respect of the said property and all costs expenses dues and fees including the bank's solicitor's costs on a solicitor and client basis and fees of the valuer real estate D agent, if any, and the residue, if any, only shall be payable to the borrower and no assignee or purchaser from the bank shall be concerned to ascertain whether or not any such default has actually arisen so as to entitle the bank to exercise its powers of sale or assignment.

26 Upon the issue of a separate issue document of title/strata title, as the case E may be, to the said property, the borrower shall at its own cost and expense and upon being so required to do by notice in writing from the bank take a transfer of the said property from the bank if the same shall have been transferred to the bank as assignee under the sale agreement or if the bank so deems fit at its absolute discretion directly from the developer, as the case may be, and shall execute and deliver to the bank F a charge under the National Land Code 1965 or the Land Ordinance (Sabah Cap 68) or the Land Code of Sarawak as the case may be, in such form and containing such terms and conditions as may be prescribed by the bank over the said property in favour of the bank to secure the repayment to the bank of the banking facilities and all other monies together with interest thereon at the relevant prescribed rate payable and G owing by the borrower by virtue of this assignment at the date of the execution of the said charge and notwithstanding the completion and perfection of the said charge this assignment shall as regards any antecedent default by the borrower remain in full force and effect.

The effect that is to be given to these clauses is a matter that must be dealt with later. For the moment, I return to what remains of the narrative. H

By late 1997, the respondents had made default in making repayment of the principal and interest that the appellant was entitled to have under the assignment. After making unsuccessful demands for payment, the appellant took steps to sell the subject property by public auction, but without having first obtained an order of court in that behalf. In resorting I to the remedy of self-help, the appellant relied on the powers of attorney and cl 8 read with cl 23.4 of the assignment. The respondents took exception to this.

A On 8 April 1998, they took out an originating summons seeking a number of reliefs, including a declaration that the exercise by the appellant of its right to sell the subject property by public auction is invalid and/or unlawful. An injunction restraining the appellant from proceeding with the sale was also sought.

B The learned judge who heard the summons, after considering the written submissions that had been put in, granted the declaration and the injunction I mentioned a moment ago (see [1999] 1 MLJ 89). He also directed an assessment of damages and awarded the respondents the costs of the action. The appellant then appealed to this court against the orders made by the judge.

C

The judgment under appeal

In holding for the respondents, the learned judge proceeded upon three main grounds. *First*, it appears that he held that the power of attorney given by each respondent was invalid. I say 'appears' advisedly because the D learned judge did not make a specific finding that the powers of attorney were invalid. What he did say was that he doubted their validity because the certificate of authentication in respect of each preceded the date of its grant by several months. However, when read in its proper context, what he obviously meant was that it was not open to the appellant to rely upon the powers of attorney to sell the subject property by public auction. Although E the appellant, in its memorandum of appeal, formulated a ground of complaint against this finding of the learned judge, the point was not pursued before us by Mr Porres Royan of counsel for the appellant. That is why I said earlier in this judgment that these powers of attorney were of no significance to the present appeal.

F *Second*, the learned judge, having held the assignment to be absolute, went on to hold that it was therefore incumbent for the appellant to apply for and obtain an order for sale pursuant to O 31 r 1(1) of the Rules of the High Court 1980 ('the RHC'). The learned judge arrived at the latter conclusion based on his interpretation of the decisions in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 (affirmed by the G Supreme Court, sub nom *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149) and *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590. He thought that these cases were authority for the proposition that a lender similarly circumstanced as the appellant, notwithstanding an express power of sale reserved to him in the contract of loan, can realize his security through a judicial sale. *Third*, the learned judge H held that even if he were to hold the assignment not to be absolute, it created an equitable charge which was only enforceable by resort to the procedure laid down in RHC O 83.

In essence, the second and third findings of the learned judge constitute his reasons for resolving the sole issue in this case, identified very early in I this judgment, in the respondent's favour. Before us, the appellant attacked both findings. It therefore becomes necessary, in order to determine the sole issue in the appeal, to address separately each reason advanced by the learned judge.

The first ground: Applicability of O 31 r 1(1) A

The starting point here is the assignment itself. The learned judge came to the conclusion that the assignment was absolute in nature and effect. In approaching the question of construction, he relied upon the decision of the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, where in an oft-quoted passage Seah FJ, said (at p 270C–E): B

> It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. C

The reference to s 4(3) of the Civil Law Act 1956 is apposite in this case since it is equally relied upon here. This is what it says: D

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action from the date of the notice and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. E F

In a case in which the section becomes relevant, then (at p 270I–B):

> ... all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 of the Judicature Act 1873 [being the UK equipollent of s 4(3)] and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190). G

Mr Porres Royan of counsel for the appellant has no quarrel with this part of the learned judge's judgment. He accepts that the assignment upon its true construction is an absolute assignment and comes within the statute. His main complaint is that the judge went wrong in concluding that *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* and *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* are authority for the proposition that an assignee who is similarly circumstanced as the appellant *must* obtain an order for sale from the court for the purpose of recovering monies due to it from a borrower. He has argued that these cases merely support the proposition H I

A that an assignee in like position as the appellant *may* apply for an order for sale. He adds that RHC O 31 r 1(1) which was relied upon by the court in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* is merely a procedural and not a jurisdictional provision. These arguments necessitate an examination of the authorities relied upon by the learned judge and criticised by counsel.

B In *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd*, the plaintiff bank granted a loan to the defendant pursuant to a loan agreement. As security for the loan, the defendant executed a deed of assignment absolutely assigning to the plaintiff all its rights, title and interest in certain immovable property, to wit, a parcel of sub-divided building in respect of which strata title had not been issued, and in the sale and purchase agreement by which C the defendant had purchased that property. The loan agreement provided that the defendant would remain in possession of the property only as contractual licensee of the plaintiff and that within seven days after its licence to occupy the property has been terminated, it would have to give immediate vacant possession thereof to the plaintiff, and thereafter the plaintiff would have the right to enter upon the property and to deal with all D its rights, title and interest in the property. The defendant defaulted in making payments due under the loan agreement and the plaintiff, after notification to the defendant, took out an originating summons praying for inter alia, an order for sale of the property. The High Court held that as a matter of contract, the plaintiff had lawfully terminated the defendant's E licence to occupy the property in question and was entitled to enter upon the property and to deal with it. It also granted the order for sale sought by the plaintiff.

Edgar Joseph Jr J (as he then was) when granting the latter relief said (at p 66 of the report):

F > Accordingly, the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a subdivided building, strata title, in respect of which is yet to be issued, this court has jurisdiction under s 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an G order for sale of the property consequential thereto.
>
> If, contrary to my primary opinion, the security herein is not a security relating to a chose in action but a security relating to land, then I would hold that this court has jurisdiction under O 31 r 1(1) of the Rules of High Court 1980 (adapted from O 51 of the English Rules of the Supreme Court 1965) to make an order for sale of the property: see *Oldham v Stringer* (1885) 51 LT H 895.

It is plain from a reading of his Lordship's judgment that he grounded his jurisdiction to make an order for sale upon s 41 of the Specific Relief Act 1950 and upon the courts inherent jurisdiction. It was only his alternative view that RHC O 31 r 1(1) conferred jurisdiction upon a court to make an I order for sale in the circumstances that were before him.

Hipparion appealed. The case is reported as *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd.* In support of its appeal, Hipparion argued in the

main that the plaintiff bank was seeking to enforce a security for repayment of a loan and that the security documents concerned could be construed either as a security relating to land or a security relating to a chose in action. It was contended that if the security documents were construed as a security relating to land, then the plaintiff's remedies would be restricted to orders of court under s 257 of the National Land Code 1965 and the sale, if there was to be one, would have to be by way of a judicial sale by public auction. But it was contended that as the documents were not in the form prescribed by the National Land Code, the plaintiff should fail. Hipparion's alternative argument was that at best the security interest created by the assignment and the loan agreement was a security over a chose in action. But it was contended that the assignment was purported to be by way of charge only as opposed to an absolute assignment and it was not open to the plaintiff to claim any beneficial interest in the said property. The Supreme Court rejected these arguments. It upheld the decision of Edgar Joseph Jr J. Gunn Chit Tuan SCJ (later CJ (Malaya)), when delivering the judgment of the Supreme Court, said (at p 151):

> Looking at the document: we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form, to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property. As we have come to the conclusion that it was an absolute assignment we did not think it necessary to consider the contention of counsel that an equitable charge was made in this case. The appeal of the defendant was therefore dismissed with costs.

As may be seen from the proceedings before the Supreme Court, Hipparion did not challenge the High Court's finding on the jurisdiction point. The Supreme Court did not, however, disapprove the basis upon which Edgar Joseph Jr J, grounded jurisdiction to make the order for sale.

Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd was a case that was closely related to the decision in *Hipparion*. The sale of the property that formed the subject matter of the dispute in the earlier litigation before his Lordship Edgar Joseph Jr J, failed to produce sufficient proceeds to satisfy the bank's claim. Raju Jayaraman Kerpaya (the guarantor) had executed a guarantee as security for the loan to Hipparion. The bank brought proceedings to enforce the guarantee. It was argued, inter alia, for the guarantor that as the deed of assignment by Hipparion had been held by the Supreme Court to be absolute, it had the effect of extinguishing the loan so that the guarantor was no longer liable. This court, when rejecting the guarantor's argument, said (at pp 595–596):

> The argument that the deed of assignment was absolute and therefore satisfied the loan in full upon its execution overlooks the fact that the point under discussion, namely whether the deed was absolute or by way of charge only, arose in the earlier proceedings between the respondent and Hipparion in a

procedural context. It was never Hipparion's case in the earlier proceedings that its debt had been extinguished upon the execution of the deed in question. A careful reading of the judgment of Edgar Joseph Jr J (as he then was) at first instance and that of Gunn Chit Tuan SCJ [later CJ (Malaya)] delivered on behalf of the Supreme Court make these matters plain. It therefore follows as a matter of principle that the finding by the courts at all levels in the Hipparion proceedings that the deed of assignment was absolute and not by way of charge only was made in the context of the procedure adopted by the instant respondent to effect a sale of the subject property.

With respect, we do not see the decision of the Supreme Court in the Hipparion proceedings as facilitating the argument that the debt owed by Hipparion had been extinguished by the absolute assignment it gave the respondent. Both principle and policy lie against the opposite conclusion. The principle we have already adverted to. As far as policy is concerned, countenancing the appellant's argument would have the effect of frustrating the recovery of loans in all cases where a financial institution takes an absolute assignment because there is unavailable a title capable of being subject to a registered charge. The construction and sale of multi-storeyed residential and commercial premises would grind to a halt because no financier will ever lend money if the law were to declare all sums due under a loan agreement irrecoverable because a deed of assignment absolute of particular premises has the effect of extinguishing the debt. We are unable to countenance a proposition that would produce so radical an effect.

In support of his argument that RHC O 31 r 1(1) is merely procedural and not jurisdictional, Mr Royan relied on the fairly recent decision of the English Court of Appeal in *Wicks v Wicks* [1998] 1 All ER 977. There, in regard to the identical rule in the English RSC, Ward LJ said (at p 989):

> It does not follow that O 31 is an original source of jurisdiction. It is a procedural provision the exercise of which is dependant on there being a cause or matter in the Chancery Division relating to land or an application for ancillary relief in the Divorce Court relating to land. In its application in the Chancery Division, O 31 seems to remove the need for the previous practice to direct a sale either 'with the approbation of the judge' or 'out of court' and to give a flexible procedure for the management of any sale. It seems to be purely procedural in its intent and in its effect. I agree with Nicholls V-C in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] 1 All ER 755 at p 761, [1994] Ch 142 at p 149, when he said:
>
> > 'These rules regulate and prescribe the 'practice and procedure' to be followed in the Supreme Court (s 84 of the Supreme Court Act 1981). They regulate the exercise of the court of its jurisdiction; they cannot extend the court's jurisdiction or confer a jurisdiction which, in the absence of rules, the court would otherwise lack.'
>
> In my judgment O 31 has no application to the facts of this case. Moreover, and again with regret, I conclude that it is not a source of jurisdiction enabling the court to make interim orders for the sale of property pending the determination of the claims for ancillary relief.

For my part, I am content to say that whatever may be the jurisdictional effect; or more appropriately, the lack of such effect; of any or all of the provisions in the English RSC, the position in Malaysia differs. We have in our RHC O 92 r 4 which is absent in the English RSC and which expressly

declares the inherent powers of the High Court. It is in essential respects *ipsissima verba* s 151 of the former Civil Procedure Code of Malaya which was repealed and replaced by the Rules of the Supreme Court 1957 and s 151 of the Indian Civil Procedure Code. The wide reach of the Malayan provision was recognized by the Court of Appeal of Malaya in *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1. Hepworth J, with whom the other members of the court concurred, observed (at p 5):

> The court has therefore in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do that real and substantial justice for the administration of which alone it exists. The law cannot make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen, and it is therefore the duty of a Judge to apply them not only to what appears to be regulated by their express provisions, but to all the cases to which a just application of them may be made and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it. This section [ie, s 151] does not confer any powers but only indicates that there is a power to make such orders as may be necessary for the ends of justice and to prevent an abuse of the process of the court.

In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, it was held that RHC O 92 r 4 is a jurisdictional provision. See also *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525.

It follows that Edgar Joseph Jr J, was entirely right when he said that he had inherent power to make the declarations claimed and the consequential order for sale sought by the plaintiff in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd.* Since his view upon the matter met with no adverse criticism from the Supreme Court, it is safe to assume that there was sub silentio affirmation of that view. But the conclusion I arrive at upon this part of the case does not, on a proper appreciation of Mr Royan's submissions, conclude the matter against the appellant.

To recall, his argument is that the decisions in *Hipparion* and *Raju Kerpaya Jayaraman* do not say that it is *mandatory* for an assignee similarly circumstanced as the instant appellant to move a court under RHC O 31 r 1(1) for an order for sale in the face of an express covenant granting the assignee an unconditional power of sale as is found to exist here in the form of cl 23.4 of the assignment. Having heard these two cases read during argument and having re-read them in the quiet of my chambers, I am constrained to agree with the submission of counsel.

In my judgment, these decisions are not authority for the proposition that it is mandatory for a lender who secures the loan by means of a deed of assignment over immovable property, that is without an issue document of title, to move the court under RHC O 31 r 1(1) and obtain an order for sale for the purpose of enforcing his security. They are merely authority for the proposition that if the lender does make such an application, then the court is seized of jurisdiction to grant him an order for sale.

For these reasons, I find myself unable to agree with the first ground advanced by the learned judge for granting the respondents the relief they

claimed. The conclusion I have arrived at renders it unnecessary for me to address the other arguments advanced by Mr Royan on the first ground. But this much I will say: that I do not agree with his submission that the appellant is in a like position to a mortgagee at common law.

In a common law mortgage, the *legal title* to immovable property is transferred absolutely by the mortgagor to the mortgagee, the former having an equity to redeem the title upon making payment of the loan. In the present instance, there was merely an absolute assignment of all benefits which the respondents had under the agreement they had with the developer. In other words, it was an assignment of a chose in action. There was no conveyance of the title simply because the subject property had none issued in respect of it. What the respondents had was a right in contract (enforceable either by a decree of specific performance or an award of damages) to have a re-assignment of the chose unto themselves when they had paid off the loan. This is far from saying that they had an equity of redemption. See *Haji Abdul Rahman v Mahomed Hassan* [1917] AC 209.

I take the point as concluded against Mr Royan by high authority. There are several pronouncements upon the subject in the context of the law of immovable property under our version of the Torrens system. I will not go through them all here. Suffice to quote from just one authority.

In *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504, Jemuri Serjan SCJ (later CJ (Borneo)) said (at p 507):

> It thus can be appreciated that the equity of redemption as is known in England which is in the nature of a right bears no similarity in idea and effect with the equity of redemption in New South Wales, Australia, where a mortgage is closely analogous to a charge under our National Land Code, but in practice, coupled with a transfer of the legal title as well and where the equity of redemption is not a right but has grown out of practice. 'Equity of redemption' is a misnomer but persistence in its use is not a matter of law but of habit in Australia and *in Malaysia it does not exist at all, either in the sense as understood in English law or in Australia,* at least in New South Wales. (Emphasis added.)

With that, I now turn to consider the second and alternative ground that found favour with the learned judge.

The second ground: Equitable charge

The learned judge's views upon the second ground appears in the following passage in his judgment (at pp 94H–95A) :

> Even if I were to hold that the security documents do not create an absolute assignment which I hasten to add, I do not so find, it is my judgment that in such an event, the security documents would in any case, create an equitable charge. If that be the case, then the appropriate procedure to be adopted by the financier in this case would be to commence proceedings under O 83 of the RHC (see *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135).

Mr Royan submits that the learned judge was in error in opinion he expressed in the foregoing passage. He has argued that the assignment was not an equitable mortgage or charge. For the creation of such an

encumbrance, there must be a deposit of the title deeds to the property given as security for a loan. In the present case, there was no deposit of title deeds, simply because there was no issue document of title to deposit. He submitted that both the High Court in *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135 and the Federal Court in *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97 were wrong in holding that such a transaction as the present amounted to an equitable charge or mortgage. Mr Royan however concedes that if these decisions are correct, then it is obligatory for the appellant to obtain an order for sale under RHC O 83 for the purpose of enforcing its security over the subject property.

Before any view is expressed upon these submissions, it is necessary to appreciate the concept that lies at the heart of the present discussion. It has to do with the expression 'equitable charge' that has been used both in argument and in the judgment appealed against. It is not a mere question of nomenclature. It is of matter of substance. For, as will appear in a moment, there is a world of difference in point of concept between the security known as an equitable charge and that which is termed an equitable mortgage. Unfortunately, several authorities upon the subject have used both expressions interchangeably resulting in much confusion. It is of paramount importance to keep them apart in order to fully appreciate the nature and scope of each form of security.

By definition, an equitable charge is a grant by a disponor of property, whether inter vivos or by will, of moneys to be paid out by the disponee to a third party from the subject matter of the disposition to discharge a debt or other obligation. The editors of the 28th edition of *Snell's Principles of Equity* (at p 437 of the work) illustrate the concept of an equitable charge by the following example:

> An equitable charge is created when X devises Blackacre to A subject to a charge for £1,000 in favour of B, or where Y signs a document charging Whiteacre with the payment of £500 to C. Again, if Z is bound by contract to pay a debt due to D out of specified property, then D has an equitable charge on the property for the amount of the debt, whether or not Z and D knew or intended such a result. In each case, there is no mortgage, because no estate or interest in the land has been conveyed or agreed to be conveyed, either at law or in equity; but there is an equitable charge because the property stands charged with the payment of the stated sum, and the chargee is entitled to have this realized by judicial process.

The leading case upon the subject is *Montagu v Earl of Sandwich* (1886) 32 Ch D 525. There, a father executed a deed of settlement upon the marriage of his second son, the plaintiff in the action. In it, he covenanted to pay the plaintiff an annuity of £1,000 a year for life and to charge the annuity on a sufficient part of the real estate owned by him on his death. But the father retained the right to deal with his real estate during his lifetime subject only to leaving in his will sufficient real property to meet the annuity. The father then made a will devising his real estate (subject to all charges and incumbrances thereon) in strict settlement on his first and other sons in tail male. He also bequeathed the greater part of his estate in

personalty among his children, giving the plaintiff legacies which, when invested, would produce an income of more than £1,000 a year. Later, the father died. The plaintiff was paid the annuity of £1,000 up to the time of his father's death. A dispute arose as to whether the father had fully satisfied the payment of the annuity by bequeathing the legacies to the plaintiff. The plaintiff brought an action claiming a declaration that the real estate his father owned at the latter's death was charged with the annuity of £1,000 under the covenant in the marriage settlement. At first instance, Pearson J granted the declaration. The defendant appealed, contending that the father had merely covenanted to do an act which did not have the effect of creating a charge. The majority of the English Court of Appeal (Cotton LJ, dissenting) rejected this contention.

Fry LJ said (at p 545):

> The actual operation of the covenant is that the covenantor agrees that he will charge the annuity on a sufficient part of the real estate of which he shall die seized, but, as has been already observed by Lord Justice Bowen, the covenantor expressly declares that he enters into this covenant so as to render the real estate, if any, of which he, the Earl, shall die seized in fee, the fund primarily liable for the satisfaction or discharge of this covenant. But, if primarily liable, it is obvious that it is rendered liable; and therefore I find an express declaration of intention that this covenant, the covenant to charge an adequate part, is to render liable the entirety of the estate of which the testator shall die seized. That appears to me to have this operation, that it charges the entire estate of which the testator dies seized until the execution of a new instrument which shall charge an adequate part afresh, and thereby discharge the remainder of that which is primarily charged.

The distinction between an equitable charge and an equitable mortgage was lucidly explained by Buckley LJ in *Swiss Bank Corp v Lloyds Bank Ltd & Ors* [1982] AC 584 at pp 594G–596A:

> We are not concerned here with a charge on an equitable interest in property but with an equitable charge upon property in the legal ownership of the party creating the charge.
>
> An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage. An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so: see *Fisher and Lightwood's Law of Mortgage* (9th Ed, 1977), p 13. An equitable charge which is not an equitable mortgage is said to be created when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realization by judicial process, that is to say, by the appointment of a receiver or an order for sale: see *Fisher and Lightwood*, p 14. It is not, I think, necessary to determine in the present case in what circumstances there is a true distinction between these two types of charge or precisely where it lies. From the way in which the judge dealt with the matter in his judgment it is, I think, clear that he was applying his mind to the question whether the

circumstances of the case gave rise to an equitable charge by way of mortgage. The argument in this court has also proceeded upon the same lines, but I must not overlook the possibility of the existence of an equitable charge which is not of the nature of a mortgage.

The essence of any transaction by way of mortgage is that a debtor confers upon his creditor a proprietary interest in property of the debtor, or undertakes in a binding manner to do so, by the realization or appropriation of which the creditor can procure the discharge of the debtor's liability to him, and that the proprietary interest is redeemable, or the obligation to create it is defeasible, in the event of the debtor discharging his liability. *If there has been no legal transfer of a proprietary interest but merely a binding undertaking to confer such an interest, that obligation, if specifically enforceable, will confer a proprietary interest in the subject matter in equity.* The obligation will be specifically enforceable if it is an obligation for the breach of which damages would be an inadequate remedy. *A contract to mortgage property, real or personal, will, normally at least, be specifically enforceable, for a mere claim to damages or repayment is obviously less valuable than a security in the event of the debtor's insolvency. If it is specifically enforceable, the obligation to confer the proprietary interest will give rise to an equitable charge upon the subject matter by way of mortgage.*

It follows that whether a particular transaction gives rise to an equitable charge of this nature must depend upon the intention of the parties ascertained from what they have done in the then existing circumstances. The intention may be expressed or it may be inferred. If the debtor undertakes to segregate a particular fund or asset and to pay the debt out of that fund or asset the inference may be drawn, in the absence of any contra indication, that the parties' intention is that the creditor should have such a proprietary interest in the segregated fund or asset as will enable him to realize out of it the amount owed to him by the debtor: compare *Re Nanwa Gold Mines Ltd* [1955] 1 WLR 1080 and contrast *Moseley v Cressey's Co* (1865) LR 1 Eq 405 where there was no obligation to segregate the deposits. But notwithstanding that the matter depends upon the intention of the parties, if upon the true construction of the relevant documents in the light of any admissible evidence as to surrounding circumstances the parties have entered into a transaction, the legal effect of which is to give rise to an equitable charge in favour of one of them over property of the other, the fact that they may not have realized this consequence will not mean that there is no charge. They must be presumed to intend the consequence of their acts. (Emphasis added.)

The judgment of Buckley LJ, in the Court of Appeal was approved by Lord Wilberforce in the House of Lords. See *Swiss Bank Corp v Lloyds Bank Ltd* at p 615.

Concept apart, there is also a difference in point of remedies between these two forms of security. I take it as settled that for the most part, the remedies available to an equitable mortgagee are the same as those available to an equitable chargee. However, the important remedy of foreclosure which is available to the former is not available to the latter. See *Tennant v Trenchard* (1869) 4 Ch App 537 at p 542.

My reading of the leading works and decided cases upon the subject have led me to the conclusion that in *English* equity jurisprudence, an equitable mortgage is created in four distinct situations, subject always to a

A contrary intention being expressed in the relevant instrument or being found to exist inferentially from the surrounding circumstances of the particular case. The four instances are these:

(1) when money is lent on the strength of a deposit by the borrower of title deeds to real property as security for the loan.

B (2) where a loan is secured by an ineffectual attempt to create a legal mortgage to secure the transaction.

(3) where the subject matter of the mortgage is an equitable interest in property.

(4) where a loan is made upon an agreement by the borrower to create a C legal mortgage.

I have laid emphasis upon the position in English equity jurisprudence for the purpose of reminding myself that our courts, while under a statutory direction to apply the rules of equity prevailing in England are also required to modify these to suit local conditions. In saying this, I refer, of course, to D s 3(1) of the Civil Law Act 1956, and in particular, to the proviso to that subsection. Section 3(1) reads as follows:

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in West Malaysia or any part thereof, apply the common law of E England and the rules of equity as administered in England on 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of F equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to sub-s (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants G permit and subject to such qualifications as local circumstances render necessary.

The proper approach to be adopted in the application of rules of equity to our land law was stated by Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* H [1988] 2 MLJ 449 at p 463D–I as follows:

> The Torrens system as codified by the National Land Code 1965 deals with registration of land and provides simplicity and certitude in transfers of land. It is a system of conveyancing and provides indefeasibility of title to a registered owner of land against any rival claimants except in the case of fraud or similar misconduct as provided under s 340(2) of the Code. It does not I prevent or restrict the creation of beneficial interests in land by way of express, implied or resulting trust arising by operation of law in Malaysia by virtue of s 3 of the Civil Law Act 1956. It does not abrogate the principles of equity but

alters the application of particular rules of equity in so far as is necessary to achieve its special objects. In this way, the court is entitled to exercise jurisdiction in personam to insist upon proper conduct in accordance with equitable principles and norms (see *Wilkins & Ors v Kannammal & Ors* [1951] MLJ 99 at p 100; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 at p 45 and *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 at pp 164–165).

The exercise of jurisdiction in personam should be distinguished with the exercise of jurisdiction in rem. It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time, it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust. The position is made clear from some authorities on the matter.

See also *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 756.

Our law of immovable property does not recognize the concept of an English legal mortgage. The form of security provided at law is a registered charge under the National Land Code 1965. But our courts have always recognized equitable interests in land, including an equitable mortgage created by the deposit of title deeds. Of the several authorities on the point, three require mention.

The first of these is *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, where Salleh Abas CJ (Malaya) (later Lord President) observed (at pp 270F–271F):

Our land law does not recognize a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land, is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognizes a mortgage in the sense of Torrens system, referred to by text written as Torrens Mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when s 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code (see *Haji Abdul Rahman & Anor v Mahomed Hassan* [1917] AC 209 at p 217). That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. *These could be an equitable charge or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.*

The decision of the Privy Council in *Haji Abdul Rahman v Mahomed Hassan* certainly does not prevent the creation of an equitable charge. In that case, an agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but

A only a contractual right. The nature of this contractual right was amplified by Terrell Ag CJ in *Arunasalam Chetty v Teah Ah Poh Trading & Anor* [1937] MLJ 17 at p 21 to be a security for debt outside the provisions of the Land Code.

On the other hand, if *Haji Abdul Rahman*'s case is considered to have the effect of preventing the creation of an equitable charge, the effect of the B decision cannot be extended to other cases. In that case, the agreement was held void as a transfer or as a burdening instrument because it contravened s 4 of the (Selangor) Registration of Titles Regulation 1891. This section prohibited the transfer, transmission or the creation of any mortgage or charge, or otherwise dealt with except in accordance with the provisions of this Regulation, and 'every attempt to transfer, transmit, mortgage, charge, or C otherwise deal with the same, except as aforesaid, shall be null and void and of none effect, ...'. And s 41 enacted that 'whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Sch E, which must be registered as hereinbefore provided'.

But the subsequent Land Code and the present National Land Code do D not contain provisions similar to s 4 of the above quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. Examination of courts' decisions clearly show that *the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor*, although E no charge or lien within the provisions of the National Land Code or the previous Code is executed or created (see *Ngan Khong v Bamah bte Pakeh Jamin & Anor* [1935] MLJ 167; *Arunasalam Chetty v Teah Ah Poh Trading*; *Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ 59 and *Mercantile Bank v Official Assignee* [1969] 2 MLJ 196). The basis of this ruling is the very raison d'etre of the court's own existence and the imputed intention of the legislature. Terrell Ag CJ in *Arunasalam Chetty*'s case said:

F

> '... It is the duty of the courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds ...' (p 22)

> '... but it is difficult to believe that it was the deliberate intention of G the Kedah legislature by the mere omission to exclude the recognition of the principle of an equitable deposit.' (p 21)

These statements were supported by Whitley Ag CJ (SS) who sat in the same case and said:

> '... the courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes.' (p 18)

H

Raja Azlan Shah J (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd* case when he said:

> '... unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties ...'(p 197).

I

There is, however, no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore,

equitable charge and liens are permissible under our land law. (Emphasis added.) A

The second authority is *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135. The plaintiff there had lent money to the defendant on the security of a loan agreement and a deed of assignment over immovable property in respect of which no strata title had been issued. The defendant B having defaulted in making payment of the instalments due under the loan agreement, the plaintiff instituted proceedings for a writ of possession and an order for sale pursuant to RHC O 83. Mohamed Dzaiddin J (now FCJ) held that the loan agreement and assignment in that case created an equitable charge. He then said in the concluding paragraph of his judgment (at p 136G–H): C

> In my opinion, an application such as the present one for an order of possession and for sale of property should be made under O 83 and not under O 31 because by its nature and substance O 83 provides for an application for sale by an equitable chargee. In the present case, the bank is an equitable chargee, as there is no issue document of title having been issued in respect of D the said property.

The third and last authority is *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97, where the facts, so far as relevant to the present discussion, were these. Chuah Eng Khong, the appellant in that case, had borrowed a sum of money from the respondent, Malayan Banking Bhd, to E purchase a piece of land in respect of which no document of title had been issued. The loan was secured by means of a document entitled 'loan agreement cum assignment'. This document contained a covenant by Chuah to execute a charge over the said land once the document of title relating thereto was issued by the appropriate authority. An argument that the loan agreement cum assignment in that case did not operate to create F an interest in land was rejected by the Federal Court. Peh Swee Chin FCJ when delivering the judgment of the court said (at pp 108I–112F):

> At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the G purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code 1965 ('the NLC'). It is true that H nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower 'shall be entitled ... to obtain a discharge and release of the said lot from the lender' (see cl 27 of the said loan agreement). Thus, we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right, title and interest' in the said land pending the exercise of such contractual right to redeem. The I said loan agreement, therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at

A the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial, provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage; see *William*
B *Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at p 462.

If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie, he has got the equity of redemption for, in the eyes of equity, the lender is not the owner of the said land notwithstanding the said assignment, but the borrower is, but subject to the mortgage, and the lender
C is a mere 'incumbrancer'. The equity of redemption arises as soon as any document, on a true construction, is found to be a mortgage. The use of the word 'mortgage' may sound like sacrilege in view of the presence of the NLC which does not use the word, especially to a legal man who specialises in 'common law' but not to one who is familiar with 'chancery practice', for to the latter, despite the assignment, the borrower is still the owner of the said
D land subject to the mortgage. The matter, of course, should not rest here. Further investigation into the legal position of a mortgage in this country is required.

The equity of redemption gives the borrower a second right to redeem after the contractual right to redeem the said land by a contractual date has lapsed due to expiry of time, practically in defiance of such contractual (ie
E legal) right to redeem. Such equity of redemption has been always recognized as an interest in land since somewhat ancient times; see *Pawlett v Attorney General* (1667) Hard 465 at p 469 and *Usborne v Scarfe* (1738) 1 Atk 603 at p 605, if old authorities are required.

If the said loan agreement is an equitable mortgage, by virtue of rules of equity, could it exist in the presence of the NLC? Let us discuss further.

F Rules of equity in general are applicable by virtue of the Civil Law Act 1956 and those rules of equity relating to equitable interests in land have no doubt always been recognized and applied in Malaysia unless they are expressly or by necessary implication precluded by the NLC. This view has been asserted and reasserted in a number of cases in the appellate courts in Malaysia; in *RRM Arunasalam Chetty s/o Sithambaram Chetty v Teah Ah Poh*
G *trading under the style of Mun Seng Hin Kee & Anor* [1937] MLJ 17, in which money of a creditor was secured by a deposit of document of title by the debtor to his land in Kedah. It was held that the principles of equity were applicable to land in Kedah where such application would not be inconsistent with the provisions of the Kedah Land Code which was based on FMS Land Enactments 1911 and the Registration of Titles Enactment 1911, all in fact
H based on the Torrens system of registration of titles. The Court of Appeal then unanimously held that the deposit of the documents of title as security for repayment of debts operated as an equitable charge by virtue of which the party who lent there acquired an equitable interest in the land covered by the document of title. The Court of Appeal then relied on the following authorities in support of its decision, viz *KALRM Karuppan Chetty v ARPLSP Muthia Chetty* [1938] MLJ 221; *Abigail v Lapin & Anor* [1934] AC 491 at
I p 502; *Hogg's Registration of Title to Land throughout the Empire* (1920) at pp 278–285; *Murugappa Chetty v Seenivasagam & Ors* [1936] MLJ 217; *The Motor Emporium v Arumugam* [1933] MLJ 276 and others. This is not the

place and time to elaborate on these cases cited there. The Court of Appeal granted the requested declaration of the creditor that he was an 'equitable chargee' though the original wording of the prayer did not use the word 'equitable' as an attributive.

Of greater and more direct interest to us in that case, other than the fact that the Court of Appeal had granted the declaration asked for by the creditor that he was entitled to be considered as an equitable chargee, is that Whitley Ag CJ (SS) held on the facts that the creditor was (also) an equitable mortgagee by deposit. *Hogg's Registration to Title* which was relied on by his Lordship also referred to it as a mortgage by deposit of document of title. Gordon Smith J also concluded that by virtue of the transaction (loan secured by deposit of document of title), the plaintiff was an equitable mortgagee or an equitable chargee. Terrell Ag CJ (FMS) discussed the transaction on the assumption by the clearest implication that it was an equitable mortgage by deposit. Such an equitable mortgage by deposit was, in relation to land enactments based on the Torrens system, discussed by his Lordship at length and he decided that the security did not contravene the provisions of the Land Code. At pp 20–21 of the report [*Arunasalam Chetty*], he said:

> 'The learned judge of the first division appears to consider that the proviso makes equitable principles inapplicable in cases of immovable property. But there is nothing in the Land Code which so provides. An equitable mortgage by deposit is not a charge contravening the express terms of the Land Code; it is a form of security quite outside the Land Code to which effect may be given as a contract inter partes, and which can only be implemented by means of an order of court. That such interests may exist as contracts inter personas, and quite outside any registration of titles enactment is fully recognized by the Privy Council in the case of *Abigail v Lapin* [1934] AC 491, the principle of which decision was recently adopted by the FMS Court of Appeal in the case of *AMM Murugappa Chetty v S Seenivasagam & Ors* [1936] FMSLR 33; [1936] MLJ 217 .... It is the duty of the courts to do justice between parties, and unless expressly prohibited by statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the enactment, is to enable the enactment to be sued as an instrument of fraud. Even in the Federated Malay States, therefore, the courts have found themselves constrained again and again to apply equitable principles, not because English equitable principles apply, but because the application of such principles is in accordance with natural justice. I would refer in particular to the case of *Boase v Cluny Rubber Estates Ltd & Ors* 2 FMSLR 130 and the more recent case of *Arumugam v The Motor Emporium* [1933–34] FMSLR 21; [1933] MLJ 276.'

Although there is a well-known distinction between a mortgage where a borrower's land is usually transferred or assigned subject to the equity of redemption and a charge where such land is not transferred or assigned at all but it gives the chargee rights over the land, a charge of land has always been regarded as a species of mortgage for most practical purposes; see *Law of Real Property* by Sir Robert Megarry (former Vice Chancellor of Supreme Court of the United Kingdom) and HWR Wade (5th Ed) at p 914.

A The Court of Appeal used the words 'equitable mortgage' in relation to the security transaction without restraint and totally without any inhibition in the face of the National Land Code. We support such usage.

Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge, as there was no deposit of document of title with the lender, as in *Arunasalam Chetty*, for when the said loan B agreement was signed, there was no actual and single document of title over the said land at the time of the signing of the said loan agreement.

The Federal Court in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 approved *Arunasalam Chetty* and held that an equitable charge had arisen when a sum, claimed by the plaintiffs, was paid as deposit for the purchase of some land in which the plaintiffs and the defendant C (recipient of the sum) were engaged in a joint venture.

Suffian LP in *UMBC v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 held that the possession of the land title 'gives them an equitable interest in lands ...' . In the fairly recent case of *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135, Mohamed Dzaiddin J applied principles of equity in holding the transaction before him to be an equitable charge. D

The well-known case of *Hj Abdul Rahman & Anor v Mohamed Hassan* [1917] AC 209 concerned an agreement dealing with land in Selangor in which a debtor transferred his land in Selangor to his creditor as security for a debt with a condition that if the debtor repaid him within six months thereafter, the land would be re-transferred to the debtor. Selangor's Registration of Titles Regulations 1891 was then in force. By s 41 of the said E Regulations, it was provided that whenever any land was intended to be made security in favour of any other person, the proprietor would have to execute a charge in the form provided. Further, s 4 of the said Regulations expressly provided that land could only be dealt with in accordance with the said Regulations and that every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same except in accordance with the provisions of the F said Regulations 'shall be null and void and of no effect ...' . The Privy Council was in my opinion driven by s 4 to hold that the agreement conferred 'no real right in the land' and compare the dictum of Terrell Ag CJ set out above.

Subsequent Land Code and the present NLC have not contained or have deliberately left out any provisions similar to s 4 of the said 1891 Regulations. G The decision of *Hj Abdul Rahman* in refusing to uphold the agreement there on account of the said s 4 should not be used as an authority to negative or invalidate any equitable mortgage or equitable charge created by contracts outside any enactments of the Torrens system's registration of titles such as the NLC.

H The three judges in *Arunasalam Chetty* had used the expression 'equitable mortgage' to the transaction of loan of money secured by a deposit of title, a fortiori, the said loan agreement should be called an equitable mortgage on the facts. Thus, s 21(1) of the Limitation Act 1953 provides 12 years in the case of mortgage of land. The word of 'mortgage' is used. Effect should be given to the intention of Parliament.

I Learned counsel's submission that the said loan agreement did not create any interest in land is, therefore, fallacious in view of what has been discussed above, and further, the submission that the said loan agreement was a mere

chose in action dealing with personal property (as opposed to land) would also fly in the face of the said interest in land. A chose in action is always in respect of personalty. It is basically a right to file an action to recover money due on a debt or to recover pecuniary compensation on account of breach of contract or tort.

Chuah Eng Khong v Malayan Banking Bhd, being a decision of the present Federal Court, is plainly binding upon this court in accordance with the doctrine of precedent. I think this court is equally obliged to accept the decision in *Malayan Banking Bhd v Zahari bin Ahmad* as it appears to have been approved sub silentio by the Federal Court in *Chuah Eng Khong*. Accordingly, I must respectfully decline Mr Royan's invitation to treat these cases as wrongly decided. These cases are authority for the proposition that an absolute assignment by a borrower of all his rights over immovable property that has no issue document of title to a lender as security for a loan is an equitable mortgage.

In the present instance, it was found by the learned judge and is common ground before us that the assignment is an absolute assignment of the respondents rights over the subject property to the appellant. The assignment therefore falls squarely within the proposition stated a moment ago. Accordingly, it is an equitable mortgage, also known as an equitable charge in the context of our jurisprudence. On this ground alone, I must reject the appellant's contention that the assignment does not amount to an equitable charge.

I accept that there is much justification in Mr Royan's complaint about the route by which the learned judge in the instant case came to his finding that the assignment was an equitable charge. The language employed by the learned judge when arriving at his finding on this part of the case makes it amply clear that he found an equitable charge upon the assumption that the assignment was not absolute in nature and effect. Hence the words of qualification: 'Even if I were to hold that the security documents do not create an absolute assignment'. What the learned judge therefore did was to conclude that the assignment amounted to an equitable charge, *if and only if*, it was not absolute. In this, he was clearly wrong. The decisions in *Chuah Eng Khong v Malayan Banking Bhd* and *Malayan Banking Bhd v Zahari bin Ahmad* do not support such a conclusion. They support quite the opposite proposition.

But, binding precedent apart, I find that there is another ground upon which I must dissent from Mr Royan's submission.

I have earlier in this judgment adverted to four instances in which an equitable mortgage may be created *under English law*. The facts of the present case do not bring it within the first or the second. For, there was here neither a deposit by the respondents of title deeds to immovable property nor an ineffectual attempt to create a legal charge as security for the loan. I will not say anything of the application of the third instance since that is already covered by the observations of Peh Swee Chin FCJ in *Chuah Eng Khong v Malayan Banking Bhd*. It is the fourth instance with which I am concerned in the present case. It is based on the maxim that equity deems that as done which ought to be done. The doctrine has been applied

in Malaysia on several occasions within the framework of the National Land Code 1965.

In *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervener)* [1998] 5 MLJ 162, Abdul Malik Ishak J applied the doctrine by giving effect in equity to an unregistered and unregistrable agreement which was void as a lease at law. I quote with approval the following passage from his judgment (at p 182A–F of the report) in which he reviewed the relevant authorities upon the subject:

> The contractual obligations of the parties under the written agreement (P1) must be given effect. I am reminded of the principle that developed in the case of *Walsh v Lonsdale* (1882) 21 Ch D 9 to the effect that an agreement for a lease is said to be as good as a lease if it is capable of specific performance based on sufficient acts of part performance. In *Hj Abdul Rahman v Mohamed Hassan* [1917] AC 209, the Privy Council was of the view that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while useless as a transfer or burdening instrument, was good as a contract. In *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200, the then Federal Court held that failure to comply with the registration provisions of s 88 of the Sabah Land Ordinance did not render the agreement for a lease invalid and unenforceable. In *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105, the then Federal Court held that a non-registration of a 30-year lease was treated as a specifically enforceable agreement for a lease. In *Inter-Continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145, the then Federal Court once again held that a purported sublease not in statutory form was good as an agreement for a sublease and specifically enforced it. One common thread that runs through these cases is this: equity intervened and treated an imperfect lease as an agreement for a lease provided it is valid and enforceable. In the present case, by the doctrine of equitable intervention, the written agreement (P1) would be treated as an agreement for a lease and since it had been partly executed by possession having been taken under it and two buildings have since been built on it, the equitable remedy of specific performance would be undoubtedly an appropriate remedy. It is germane to mention that the proposition that a grant of specific performance based on an act of part performance must be referable to an existing contract between the parties can be found in the case of *Steadman v Steadman* [1974] 2 All ER 977.

Returning to the present instance, it may be recalled that the assignment contains an express covenant by the respondents in cl 26 to 'execute and deliver to the bank (the appellant) a charge under the National Land Code 1965' once a strata title in respect of the subject property has been issued. This is a promise de futuro by the respondents to create a legal charge in the appellant's favour over the subject property. In my judgment, the making of the loan by the appellant amounted to part performance of its reciprocal promise.

In *The Law of Securities* (4th Ed) by Edward Sykes (an Australian work) at p 143, there appears the following passage which I consider helpful:

> Nothing at great length need be said about the case of the express agreement to create a legal mortgage, save that there must be a sufficient memorandum of the contract of mortgage to satisfy the various legislative enactments which

> are based on the famous s 4 of the English Statute of Frauds, because a contract to create a mortgage is obviously one of the types of contract affected by that section, as being a contract involving the acquisition of an interest in land. Alternatively, there must have been sufficient part performance in accord with the doctrines of equity to take the case out of the statute. The implied agreement may, however, take various shapes. Thus, there may be an ineffectual attempt to create a formal legal mortgage, ineffectual by reason of failure to observe formalities; for example, one rendered ineffectual by the failure of the parties to employ seal. Equity, provided the money has been advanced, looks on the document as implying an agreement to give a legal mortgage and as creating a present mortgage in equity.

The reference to the Statute of Frauds is of no consequence as it has no application in our country. But that apart, it is plain that at least one other jurisdiction that enforces the Torrens system does give effect to an agreement to create a legal mortgage as creating a present mortgage in equity, provided those other features that equity looks for, such as acts of part performance, are present.

Adopting this reasoning, and having regard to existing Malaysian jurisprudence, I can see no impediment to this Court treating the covenant in cl 26 of the assignment as an equitable charge, which expression I treat for purposes of our law as being synonymous with an equitable mortgage.

Contracting out

That brings me to the next question. Does the fact that the assignment is an equitable mortgage preclude the appellant from exercising its contractual power of sale? As I earlier mentioned, Mr Royan with his customary frankness, conceded that the question must be resolved against his client. He said that once this court accepted that the assignment was an equitable charge, the appellant could only sell the subject property under the authority of an order of the court obtained pursuant to RHC O 83. This concession of counsel must now be tested for its accuracy, and if found to be correct, must be accepted.

The starting point for this exercise is an examination of RHC O 83 rr 1(1) and (2) of which read as follows:

> (1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs, namely —
>
> (a) payment of moneys secured by the charge;
>
> (b) sale of the charged property;
>
> (c) foreclosure;
>
> (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;
>
> (e) redemption;
>
> (f) reconveyance of the property or its release from the security;
>
> (g) delivery of possession by the chargee.

A (2) In this Order 'charge' includes a legal and an equitable charge.

A lender who has a charge (which by reason of r 1(2) includes an equitable charge) must adopt the procedure laid down by O 83 if he wishes to enforce his security. That, I think, is made abundantly clear by the opening words of RHC O 83 r 1(1). The lender is required to make an application by B originating summons supported by an affidavit. He must serve the cause papers upon the chargor who is entitled to appear and be heard on the application. The chargor may oppose the lender's application on any of the admissible grounds. Or he may apply for redemption of the security. He may, if he fails at first instance, appeal to this court. His right of appeal is a substantive and not merely a procedural right. See *Lim Phin Khian v Kho* C *Su Ming* [1996] 1 MLJ 1. If he fails before this court, he may seek leave of the apex court to prosecute a further appeal.

It follows from what I have said thus far that the right, title and interest of a chargor in the charged property may not be extinguished save in accordance with the procedure prescribed by the RHC and after the chargor D has exhausted his substantive rights of appeal. This is entirely consonant with the concept of fairness which lies at the heart of our justice system. When viewed in this fashion, it is clear to my mind that RHC O 83 is a procedural law that serves to protect the interests of a chargor.

To recapitulate, cl 23.4 of the assignment confers an unrestricted right upon the appellant to sell the subject property without the sanction of the E court. It is an agreement by which the respondents have, for valuable consideration, bargained away the protection afforded them by law, in particular by RHC O 83. The question that now calls for resolution is whether it is open for the respondents to do this. If the answer to that question is in the affirmative, then, I must reject Mr Royan's concession as F incorrect in law. But, I must agree with counsel in the event the question draws a negative response.

The authorities are unanimous upon the proposition that whether it is permissible for a litigant to waive or contract out of the provisions of a written law depends upon the language of the particular statute. And where the language is unclear, it depends upon the purpose of the statute and upon G whether its overall purpose would be defeated by permitting a waiver or contracting out. The most recent statement of the principle is to be found in the judgment of Edgar Joseph Jr FCJ, in the landmark decision of the Federal Court in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* H [1997] 2 MLJ 805. His Lordship there said (at pp 820G–821B):

> The question whether a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound and the latter can effectively contract out of performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by I permitting waiver and contracting out. *Trietel on Contract* (at p 782) has correctly pointed out:
>
> > 'Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general

principle that a person may waive any right conferred on him by statute (*quilibet potest renunciare juri pro se introducto*), difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.'

Turning to case law, on the subject of when *contracting out* of a statute may or may not be permitted, *Johnson v Moreton* [1978] 3 All ER 37; *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222; *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758; *Lee Kim Seng v Acme Canning Sdn Bhd* [1977] 2 MLJ 141 and *Hj Taib v Ismail* [1971] 2 MLJ 36 may be read with profit.

Applying the test thus propounded, an examination of the language of RHC O 83 does not disclose any express or implied prohibition against a chargor from either waiving or contracting out of its terms. I must therefore next turn to examine the overall purpose of that provision. It is clear to my mind that RHC O 83 is a procedural law that exists for the protection of a class of persons, namely chargors of immovable property. That, I believe, is its overall purpose. To permit the respondents to waive or, as they have done by way of cl 23.4 of the assignment, to contract out of its provisions would, in my judgment have the effect of defeating that purpose. It would therefore be contrary to public policy to permit the respondents as members of the class for whose benefit RHC O 83 exists from either waiving or contracting out of its provisions.

There is another ground upon which, I think, a contracting out or waiver ought not to be countenanced.

In *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd*, the Federal Court declared void a contractual power reserved in favour of a *registered* chargee to effect a sale of charged property on the ground that the express foreclosure provisions of the National Land Code could not be contracted out of or waived by the chargor. In my judgment, policy dictates that such a power in favour of an equitable chargee should be treated no differently. For otherwise, an equitable chargee would be placed in a better position than a registered chargee. Consequently, equality in treatment and parity of result is achieved by holding that an equitable chargor may not contract out of or waive the requirements of RHC O 83. Such a conclusion will, in my view, prevent lenders from by-passing the requirements under the National Land Code, through the creation of equitable charges, in order to gain an advantage they would clearly lack under statute.

The steps of logical deduction through which I have thus far taken the argument lead me next to the validity of cl 23.4 of the assignment. It is a contractual term which, upon its true construction, utterly deprives the respondents of the very valuable rights conferred upon them by RHC O 83 and the other ancillary provisions of written law. It cuts across the very spirit and intendment of RHC O 83. The respondents can, by reason of the

breadth of its language, have no say whatsoever upon the matter of the sale. They cannot be heard upon any matter touching upon the sale, be it the reserve price or the valuation of the subject property. In short, their fate in respect of these matters is entirely in the hands of the appellant. This may be readily contrasted with the beneficial provisions of RHC O 83.

In my judgment, cl 23.4 is a an agreement by which the respondents contracted out of the provisions of written law which, for the reasons already given, cannot, for reasons of public policy be waived or contracted out of. I am therefore led to the inevitable conclusion that cl 23.4 is utterly void and of no effect. The appellant was not entitled to rely upon it. Mr Royan is therefore entirely correct in the concession he made.

While preparing this judgment, a point occurred to me which I think I ought to mention for completeness. It has to do with the contractual power reserved to an equitable chargee in a deed of assignment to take possession of the charged property without an order of court. Such a power would, in my judgment, be void because it would prima facie run counter to the overall purpose of RHC O 83 which requires a chargee (whether registered or equitable) to move the court for an order for possession and, in such event, to comply with certain pre-requisites. This is apparent from the first three sub-rules to r 3 of O 83 which read as follows:

> (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.
>
> This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and *claims delivery of possession* or payment of moneys secured by the charge or both.
>
> (2) The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.
>
> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of —
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.' (Emphasis added.)

Yet, in *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd*, Edgar Joseph Jr J, at first instance, upheld the plaintiff bank's exercise of its contractual power to terminate the defendant borrower's occupational licence and to enter upon the property in question and to deal with all its rights, title and interest in that property. It is apparent from his Lordship's judgment that counsel for Hipparion did not argue against the validity of the covenant for possession in the bank's favour. Neither was the point canvassed in the subsequent appeal to the Supreme Court. Hence, it finds no mention in the judgment of that court.

It may well be that if the point arises for decision again, it be decided in the chargor's favour for the reasons I have already expressed earlier in this judgment. For, an incongruous result would otherwise be produced if a contractual right to take possession of the subject matter of an equitable charge is upheld and yet a parallel right to sell by public auction is not.

Summary

The conclusions I have reached and my reasons therefore may be summarised as follows:

(1) The learned judge was wrong in holding that the decisions in *Hipparion* and *Raju Kerpaya Jayaraman* decide that it is mandatory for a lender under a deed of assignment to resort to RHC O 31 r 1(1) for an order for sale.

(2) The learned judge was wrong in holding that the appellant was a equitable chargee only in the event that the assignment was not absolute. He ought to have held that the assignment being absolute in nature was an equitable mortgage or charge. The promise in cl 26 of the assignment to create a legal charge in the future amounts to a present equitable charge.

(3) The concession of the appellant's counsel that once it is held that the assignment is an equitable charge, the appellant must have resort to RHC O 83 is correct because:

   (a) an equitable chargee cannot contract out of the provisions of RHC O 83; and

   (b) cl 23.4 which reserves a power in the appellant to effect a sale by public auction without reference to the court amounts to a contracting out and is therefore null and void and of no effect.

(4) The order of the judge was nevertheless correct, although he proceeded upon erroneous grounds.

The result

For the foregoing reasons, this appeal could not succeed. It was accordingly dismissed. The orders made by the judge were affirmed. The appellant is to bear the costs of this appeal. The deposit was ordered to be paid out to the respondents to account of their taxed costs.

My learned sister Siti Norma Yaakob JCA and my learned brother Denis Ong Jiew Fook JCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Appeal dismissed.

Reported by Loo Lai Mee